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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 604

REGINALD P. RAY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER.

REYNOLDS ROBERTSON,
Counsel for Petitioner.

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While the Government opposes the granting of the writ in this case, and states that it believes that the ultimate conclusion of the Circuit Court of Appeals is correct (brf. 10), it advances no argument in support of the reasoning of the opinion of the Circuit Court of Appeals, nor in contravention of the five grounds of error in the proceedings below relied upon in the petition for certiorari as reasons for the allowance of the writ (petn., pp. 16-35).

The sole argument advanced in opposition to the granting of the writ is the contention of the Government that the Circuit Court of Appeals in this case erred in holding that the settlement and filing of the bill of exceptions was timely.

It is conceded that, by timely order, the district judge extended the time for filing the bill of exceptions "to and including the 1st day of November, 1936" (R. 15). November 1, 1936, was a Sunday, and the Government's whole point is that, in holding the settlement and filing of the bill on November 2, 1936, to be timely on the ground that Criminal Appeals Rule XIII provides that Sundays shall be excluded for the purpose of computing time specified in those Rules, the Circuit Court of Appeals was in error.

The Government admits that if the trial judge's order of extension had in terms specified a certain number of days or months, expiring on November 1, 1936, Rule XIII would apply and the settlement and filing in this case would be timely (brf., p. 13). Its position is that a different rule obtains where the trial judge's timely order of extension runs to a specified date, and not for a specified number of days or months.

For this proposition the Government cites no authority under the Criminal Appeals Rules, and none of the authorities which it cites as analogous has any pertinent bearing. Its argument in essence is that the trial judge must have intended that November 1, 1936—though a Sunday—should be the last date for settlement because he specified that date in his order, and that this justifies the exclusion of the operation of Criminal Appeals Rule XIII.

Whatever force such an argument might have in some cases, it clearly has none whatever in this case, for here the trial judge himself, on Friday, October 30, 1936, being expressly informed that his extension expired on Sunday, November 1, nevertheless suggested that the petitioner delete certain portions of the bill of exceptions and appear before him—not on Sunday, November 1, 1936—but on Monday, November 2, 1936 (R. 24). Government counsel were present at this time and they agreed to appear before

the trial judge on November 2 without a formal notice or order (R. 24).

In these circumstances, it seems clear that the Government's argument that the rule excluding Sundays should not be applied loses all force. On its face, the record shows that the trial judge, in selecting November 1 as the last date, was not intending to select a Sunday, and when he was informed that it was a Sunday he suggested that the parties appear before him on the following Monday. This practical construction of his own order by the trial judge makes it clearly apparent that the Government's present contention cannot be supported in reason. It has no support in authority.

The Government's argument also involves an untenable and unprecedented construction of Criminal Appeals Rule XIII. Although the Government fails so to state (Govt. brf., p. 12), prior to the promulgation of the Criminal Appeals Rule the doctrine relating to the settlement of a bill of exceptions when the last day fell on a Sunday was the same whether the period of time was measured in months or days or was to a day certain. (See *Maresca* v. *United States*, 277 Fed. 727; cert. den. 257 U. S. 657.) The Government admits that Criminal Appeals Rule XIII was intended to change the previous doctrine (brf., p. 12), and in the next breath (p. 13) seeks to limit the effect of the new rule to the case of an extension measured in months or days. However valid such an argument may be in respect of a case involving an extension of time to a day certain which is a court day, it is submitted that it would be wholly unwarranted to hold the rule inapplicable to *any* case of an extension of time to a day certain when that day falls on a Sunday. Since the first statute of limitations ever enacted, the courts have recurrently faced the problem of limitations expiring upon a Sunday, and in all branches of the law rules and statutes have from time to time been

enacted or promulgated extending the time to the next court day where the last day otherwise would fall on a Sunday. An example, among many which could be cited, is Equity Rule 80 of this Court which provides that:

> "When the time prescribed by these rules for doing any act expires on a Sunday or legal holiday, such time shall extend to and include the next succeeding day that is not a Sunday or legal holiday."

The bill of exceptions situation remained for many years one of the few fields of the law in which there was no statute or rule of court extending the time until the next court day when the last day otherwise fell on a Sunday; and when this Court promulgated the Criminal Appeals Rules it dealt with the situation by Criminal Appeals Rule XIII which provides:

> "For the purpose of computing time as specified in the foregoing rules, Sundays and legal holidays (whether under Federal law or under the law of the State where the case was brought) shall be excluded."

This is broader than, and certainly must include, the rule announced in Equity Rule 80. On any other construction, this Court would have failed to provide by Criminal Appeals Rule XIII for the commonest type of situation which has confronted the courts for many years, *i. e.*, the case where the time expires on a Sunday.

Assuming *arguendo*, however, that the provisions of Criminal Appeals Rule XIII excluding Sundays from the count did not apply to this particular order, nevertheless, the settlement and filing of the bill on the Monday is timely under the well-settled "special circumstance" line of cases. Even though it was definitely settled before the promulgation of the Criminal Appeals Rules that the bill of exceptions must be settled and filed before the end of the term, or the end of a timely extension, the cases all recognized

that in special circumstances a later settlement and filing would be sustained. It is unnecessary to review all the cases, since *Taylor* v. *United States*, 286 U. S. 1, 4, 5, is almost exactly in point on the facts and affords precise support for the settlement of the bill on the Monday where the last day fell on the previous Sunday, and where special circumstances such as those existing in the present case are shown. In that case the parties, failing to find the judge in his chambers on the Friday, agreed to ask his signature on the Monday, although the time expired on the Sunday. This Court said that, while negativing any intent to relax the general rule, the circumstances were such that the petitioner was entitled to the benefit of his bill. This ruling was made by this Court over an argument presented by the Government very similar to the one now presented, and in which cases now relied upon by the Government, including the *Maresca* case, were cited and stressed.

In the present case the facts are that the trial judge had the bill of exceptions before him as early as the previous Wednesday, October 28, 1936 (R. 23), and he in fact signed and settled it on the Friday, October 30, 1936, but subsequently on the same day struck his signature (R. 24). As a result of subsequent proceedings on the same day, Friday, October 30, at which all counsel were present, the trial judge suggested the deletion of certain matter from the bill and that the parties then appear before him on the Monday, November 2 (R. 24). On that Monday, all counsel being present, the bill was settled and filed (R. 25).

The *Taylor* decision, and prior decisions supporting it, have never been overruled, and the principle of fair play which they embody is clearly applicable to the present case. There is nothing in the Criminal Appeals Rules to change the decision in the *Taylor* case, and, so far as petitioner is aware, it has never been held that the Criminal Appeals

Rules in any way affect the validity of the ruling in the *Taylor* case.

We submit with confidence, therefore, that the point upon which the Government opposes the issue of this writ is wholly without merit for at least three reasons: (a) the argument is based upon a construction of the intention of the trial judge (Govt. brf., p. 13) which is completely negatived by the trial judge's action as shown by this record; (b) it calls for an unwarranted and unprecedented construction of Criminal Appeals Rule XIII; and (c) in any event, the exceptional circumstance doctrine of fair play applies and the settlement of the bill on the Monday was timely.

Neither the specific ground of opposition argued by the Government, nor anything contained in its brief, affords reason, we submit, for denying a review of the important jurisdictional and procedural questions involved in this case.

Respectfully submitted,

REYNOLDS ROBERTSON,
Counsel for Petitioner.

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